

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION;)	
AMERICAN CIVIL LIBERTIES UNION)	
FOUNDATION; NEW YORK CIVIL)	ECF Case
LIBERTIES UNION; and NEW YORK CIVIL)	
LIBERTIES UNION FOUNDATION,)	Case No. 13 Civ. 3994 (WHP)
)	
Plaintiffs,)	
)	
v.)	
)	
JAMES R. CLAPPER, in his official capacity as)	
Director of National Intelligence; KEITH B.)	
ALEXANDER, in his official capacity as)	
Director of the National Security Agency and)	
Chief of the Central Security Service;)	
CHARLES T. HAGEL, in his official capacity)	
as Secretary of Defense; ERIC H. HOLDER, in)	
his official capacity as Attorney General of the)	
United States; and ROBERT S. MUELLER III,)	
in his official capacity as Director of the Federal)	
Bureau of Investigation,)	
)	
Defendants.)	

**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF
CONGRESSMAN F. JAMES SENSENBRENNER, JR.
IN SUPPORT OF PLAINTIFFS**

David A. Greene (Corrected *Pro Hac Vice* pending)
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Congressman F. James Sensenbrenner

Representative F. James Sensenbrenner, Jr. hereby moves for leave to file the accompanying *amicus curiae* brief in the above-captioned case in opposition to Defendants' Motion to Dismiss (ECF No. 33) and in Support of Plaintiff's Motion for a Preliminary Injunction (ECF No. 26). Both parties, through counsel, have consented to the filing of this brief.

Rep. Sensenbrenner has represented the Fifth Congressional District of Wisconsin since 1978. He is a long-serving member of the House Judiciary Committee and the Committee on Science and Technology. Most pertinent to the above-captioned action, Rep. Sensenbrenner was the author of the USA PATRIOT Act. Rep. Sensenbrenner was chairman of the judiciary committee when the United States was attacked on September 11, 2001. Five days later, he received a first draft of the USA PATRIOT Act from the Justice Department. Firmly believing that that original draft went too far, he asked then-House Speaker Dennis Hastert for time to redraft the legislation. Following numerous meetings and negotiations with the White House, the FBI and the intelligence community, Rep. Sensenbrenner authored a revised version of the Act that was ultimately the version adopted as law. Rep. Sensenbrenner also voted to amend the Patriot Act in 2006 and voted to reauthorize certain provisions of the law, including Section 215, in 2009 and 2011.

The fundamental standard for submission of an *amicus* brief is whether it "will aid in the determination of the motion[] at issue." *James Square Nursing Home, Inc. v. Wing*, 897 F. Supp. 682, 683 (N.D.N.Y. 1995) *aff'd*, 84 F.3d 591 (2d Cir. 1996). Among other helpful roles of *amici*,

[s]ome friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group.

Neonatology Associates, P.A. v. C.I.R., 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.).

Rep. Sensenbrenner can assist the court in reaching its decision on each of the pending motions. Defendants have maintained in their Motion to Dismiss and are expected to maintain in opposition to Plaintiffs' Motion for Preliminary Injunction, that Congress in passing, amending and reauthorizing Section 215 intended to authorize the Mass Call Tracking Program challenged in this lawsuit. Rep. Sensenbrenner can offer his unique perspective on this issue.

The views of an *amicus* may align with those of one of the parties. *Concerned Area Residents for the Environment v. Southview Farm*, 834 F. Supp. 1410, 1413 (W.D.N.Y. 1993), quoting *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982) ("[T]here is no rule . . . that amici must be totally disinterested."). Indeed, in the origins of *amicus* briefing, an interest was mandatory: the United States Supreme Court established a criteria for *amici* needing to be "interested in some other pending case involving similar questions." *Northern Securities Co. v. U.S.*, 191 U.S. 555, 24 S.Ct. 119, 48 L.Ed. 299 (1903) (rejecting brief because, *inter alia*, there was no such interest).¹ Moreover, although "[a]n *amicus* . . . is not a party to the litigation and participates only to assist the court[, n]evertheless, 'by the nature of things an *amicus* is not normally impartial' . . . and 'there is no rule . . . that *amici* must be totally disinterested.'" *Waste Mgmt., Inc. v. City of York*, 162 F.R.D. 34, 36 (M.D.Pa. 1995) (quoting *United States v. Gotti*, 755 F. Supp. 1157, 1158 (E.D.N.Y. 1991) and *Concerned Area Residents for the Environment v. Southview Farm*, 834 F. Supp. 1410, 1413 (W.D.N.Y. 1993)).

For these reasons, Rep. Sensenbrenner respectfully requests that the Court grant this motion for leave to file the accompanying *amicus curiae* brief.

¹ Nor does an *amicus* need to show that a party is incompetently represented in order to participate. *Neonatology Assocs.*, 293 F.3d at 132 ("Even when a party is very well represented, an *amicus* may provide important assistance to the court.").

Dated: September 4, 2013

Respectfully submitted,

By: /s/ David Greene

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States District Court, Southern District of New York by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: September 4, 2013

Respectfully submitted,

By: /s/ David Greene
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